AND
BRIEFS

No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim
Report of the Special Master

TEXAS'S REPLY TO EXCEPTIONS TO FIRST INTERIM REPORT OF SPECIAL MASTER

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INTRODUCTION

No Party has taken exception to the Special Master's recommendation that the State of New Mexico's Motion to Dismiss be denied. The State of New Mexico unequivocally states that it "accedes to the recommendation of the Special Master that its Motion to Dismiss Texas's Complaint be denied . . . ." State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support (N.M. Exceptions) at 1. The Motion to Dismiss Texas's Complaint should, therefore, be denied.

Despite the abandonment of its Motion to Dismiss, New Mexico attempts to salvage the arguments upon which its Motion to Dismiss was based by arguing that the Special Master's reasoning in support of the recommendation should be ignored. However, the Special Master's legal conclusions are a necessary prerequisite to his recommended denial of the Motion to Dismiss. Accordingly, the First Interim Report of the Special Master (First Report) should be adopted in full, New Mexico's Motion to Dismiss Texas's Complaint should be denied, the case should move forward, and the Special Master should hear the claims raised by Texas consistent with the Special Master's recommendations.

STATEMENT OF THE CASE

A. Procedural History

In 2013, Texas sought leave to file its complaint against New Mexico, alleging that New Mexico violated its Compact obligations by permitting groundwater pumping and other diversions in New Mexico below Elephant Butte Reservoir depleting Rio Grande Project water intended for use in Texas. Texas Compl. ¶ 4. Texas filed its Motion for Leave to file Bill of Complaint on January 8, 2013. The Supreme Court granted Texas leave to file its complaint on January 27, 2014. At the same time, the Court granted New Mexico leave to file a Motion to Dismiss Texas's Complaint.

On February 27, 2014, the United States moved to intervene as a plaintiff. In its proposed complaint, the United States alleged that groundwater diversions in the Lower Rio Grande intercepted Project water, reducing Project efficiency, violating provisions of reclamation law, and violating provisions of the Compact. United States Complaint in Intervention (U.S. Compl.) ¶¶ 4-7, 12-14. The Court granted the United States leave to intervene on March 31, 2014.

New Mexico moved to dismiss both the Texas and United States complaints on April 30, 2014. After briefing on the Motion to Dismiss was complete, the Court, pursuant to its order of November 3, 2014, referred New Mexico's Motion to Dismiss to the

Special Master. The Court also referred the motions to intervene filed by the Elephant Butte Irrigation District (EBID) and the El Paso County Water Improvement District No. 1 (EPCWID) to the Special Master. The Special Master heard oral arguments as to New Mexico's Motion to Dismiss and the Motions to Intervene on August 19 and 20, 2015. The Court received the First Report on February 13, 2017. On March 20, 2017, the Court ordered the First Report to be filed and permitted the parties to file exceptions.

B. The Texas Complaint

The Texas Complaint alleges that the Rio Grande Compact (1938 Compact or Compact) was intended to equitably apportion the water of the Rio Grande above Fort Quitman, Texas, among Colorado, New Mexico and Texas. Texas Compl. ¶¶ 3, 18. Because the Rio Grande Project was the vehicle chosen by the 1938 Compact to insure delivery of Texas's apportionment, the 1938 Compact also was intended to protect the operation of the Rio Grande Project. *Id.* ¶¶ 10-12. The Complaint further alleges that New Mexico, contrary to the 1938 Compact, allowed and authorized Rio Grande Project water apportioned to Texas to be depleted through surface diversions and groundwater pumping in New Mexico. *Id.* ¶ 19.

In practice, New Mexico has granted rights, and has otherwise authorized and permitted water users within New Mexico, to intercept return flows and tributary flows below Elephant Butte Reservoir

for use in New Mexico, thereby depriving Texas of water that was apportioned to it. *Id.* Texas alleges that these actions violate New Mexico's obligations under the 1938 Compact, causing injury to Texas and its citizens. Texas Compl. ¶ 25.

C. New Mexico's Motion to Dismiss

In its Motion to Dismiss, New Mexico asserted that Texas's Complaint does not state a claim for relief because Texas failed to identify any express term of the 1938 Compact requiring New Mexico to ensure that water apportioned to Texas reaches the Texas state line. New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention (N.M. Mot.) at 27-40. New Mexico maintained that its only duty under the 1938 Compact is to deliver water into Elephant Butte Reservoir. The fundamental premise of New Mexico's motion is that the plain text of the 1938 Compact is unambiguous and does not support the allegations in Texas's Complaint. *See, e.g.*, N.M. Mot. at 1 ("The plain language of the Compact provides that New Mexico's obligation to Texas is to deliver water to Elephant Butte Reservoir, not to the Texas-New Mexico stateline".). New Mexico contended that Texas's apportionment of Rio Grande water is solely governed by and dependent upon New Mexico state water law. Focusing on Section 8 of the 1902 Reclamation Act, New Mexico argued that the proper forum to resolve Texas's claims was within the New Mexico State Court adjudication of the Lower Rio Grande. N.M. Mot. at 49-58.

New Mexico also moved to dismiss the United States' Complaint in Intervention. New Mexico argued that there is no Compact provision that prohibits New Mexico from interfering with the United States' ability to fulfill obligations to deliver water from the Rio Grande Project. It asserted that water rights below Elephant Butte Reservoir are controlled by state law and the United States, as a water user in New Mexico, must seek remedies under New Mexico state law, in the state court adjudication, for any injury to its water right. New Mexico also urged that if the Court dismissed Texas's claims, the United States' claims should be dismissed because it is not a party to the Compact. N.M. Mot. at 46-64.

D. The Special Master's Recommendation to Deny the Motion to Dismiss Texas's Complaint

Following briefing and argument by the parties, the Special Master issued his First Interim Report on February 9, 2017, recommending that the Supreme Court deny New Mexico's Motion to Dismiss the Texas Complaint as "Texas has stated plausible claims for New Mexico's violation of the 1938 Compact."[1] First Report at 217. In so doing, the Special Master put to rest the fundamental legal argument asserted by New Mexico: that New Mexico has a Compact right to intercept, divert, and deplete

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[1] The Special Master's recommendation on the Motion to Dismiss the United States' Complaint and New Mexico's exceptions to this recommendation are discussed *supra*, at pages 38-41.

water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line because that water and, indeed, the entire administration of the Rio Grande Project within New Mexico, are governed by New Mexico state water law. Based on the Special Master's analysis of the plain, unambiguous language of the 1938 Compact and its structure and design, the Special Master determined that the Compact requires that New Mexico relinquish control and dominion over the distribution of the water delivered into Elephant Butte Reservoir. First Report at 194-198.

E. New Mexico's Exceptions

New Mexico, while acceding to the Special Master's recommendation that its Motion to Dismiss Texas's Complaint be denied, nonetheless takes "exception" to the Special Master's reasoning in support of his recommendation. New Mexico has apparently abandoned its interpretation of Texas's Complaint as alleging that there is a state line delivery obligation. [2] However, New Mexico maintains that its obligations below Elephant Butte Reservoir are defined by New Mexico state law and

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[2] Although New Mexico has abandoned the argument that Texas is advocating for a state line delivery obligation, the argument is nonetheless perpetuated by *amicus curiae*, the City of Las Cruces (Las Cruces) and the Albuquerque Bernalillo County Water Utility Authority (Water Authority). Texas's response to this contention is fully briefed in its opposition to the Motion to Dismiss. *See* Texas's Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States Complaint in Intervention (Texas Opp'n) at 21-23, 25-33.

not the 1938 Compact. New Mexico argues that the Special Master's interpretation was in error because, if accepted, the Special Master's interpretation would offend basic concepts of water law. New Mexico asserts that the Special Master's reasoning violates its state sovereignty and contravenes the clear mandate of Section 8 of the Reclamation Act of 1902, which, New Mexico argues, requires that New Mexico law and procedure govern what Texas is entitled to under the 1938 Compact. New Mexico also argues that the Special Master misapplied this Court's "equitable apportionment" jurisprudence. Finally, New Mexico contends that the Special Master inappropriately made evidentiary findings in reaching its recommendations that New Mexico's Motion to Dismiss Texas's Complaint be denied.

F. Motions to Intervene

EBID and the EPCWID each filed Motions to Intervene as parties in the Original Action. All the Parties to the litigation opposed that intervention. The Special Master has recommended that the Motions to Intervene be denied, but has indicated that he will encourage the districts' continued participation as *amici curiae*. Neither the districts nor any of the Parties have taken exception to the Special Master's recommendation that these motions be denied.

STANDARD OF REVIEW

A. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides that a claim may be dismissed for "failure to state a claim upon which relief can be granted." This Court's Rule 12(b)(6) jurisprudence serves as a guide in this case. *See* Sup. Ct R. 17.2.

In evaluating a Rule 12(b)(6) motion to dismiss, a court assumes that the factual allegations in a complaint are true, and draws inferences from those allegations in the light most favorable to plaintiff. A court also construes the complaint liberally. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 572 (2006); *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The Special Master properly articulated and followed the standard of review.

B. Review of a Special Master's Recommendations

The Special Master "is generally charged to 'take such evidence as may be . . . necessary,' and to 'find the facts specially and state separately his conclusions of law thereon.' " *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980) (internal

citations omitted). The Supreme Court thereafter conducts an independent *de novo* review of the Special Master's findings, conclusions, and recommendations. *Mississippi v. Arkansas*, 415 U.S. 289, 291-92 (1974). "The findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or approval by the Court." *Mississippi v. Louisiana*, 346 U.S. at 862-63.

In considering exceptions to the Special Master's recommendations, the Supreme Court affords "respect and a tacit presumption of correctness" to the Special Master's findings while assuming the ultimate responsibility for deciding all matters. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). "In original cases . . . the master's recommendations are advisory only, yet this Court regularly acts on the basis of the master's report and exceptions thereto." *United States v. Raddatz*, 447 U.S. at 683 n.11.

C. Legal Determinations Are Proper When Ruling on a Motion to Dismiss

It is appropriate for the Supreme Court to make legal determinations while resolving a motion to dismiss. *See Montana v. Wyoming*, 563 U.S. 368, 375-89 (2011) (concurring with and adopting the special master's interpretation of Yellowstone River Compact and the nature of the appropriation doctrine in both states on Wyoming's motion to dismiss Montana's complaint); *Maryland v. Louisiana*, 451 U.S. 725, 735-45 (1981) (accepting the special

master's recommendation to deny Louisiana's motion to dismiss and the special master's determinations regarding standing and the exercise of original jurisdiction); *Nebraska v. Wyoming*, 325 U.S. 589, 607-11 (1945) (finding Colorado's motion to dismiss should be denied because the evidence supported the special master's findings that the North Platte River was over-appropriated during the irrigation season); *Arizona v. California*, 283 U.S. 423, 450-64 (1931) (interpreting the Boulder Canyon Project Act on a motion to dismiss and holding that the statute was a valid exercise of congressional power, and that the Act did not abridge Arizona's right to make future appropriations of water).

Additionally, when a compact is unambiguous, as New Mexico argues and concedes in its Motion to Dismiss, it is within the purview of the Court to interpret the compact and rule as a matter of law. *See PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) ("Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and a claim turning on that interpretation may thus be determined . . . ." (internal quotations omitted)); *see also Montana v. Wyoming*, 563 U.S. at 387 (agreeing with the special master's determinations on a motion to dismiss because plain language of the Yellowstone River Compact and the appropriations doctrine allowed Wyoming to improve its irrigation efficiency).

ARGUMENT

A. The Special Master Properly Made Legal Determinations in Response to New Mexico's Motion to Dismiss

New Mexico has abandoned its Motion to Dismiss Texas's Complaint. It nonetheless hopes to eliminate the Special Master's detailed analysis, requesting that the Court reject the Special Master's legal analysis and reasoning in support of his ultimate recommendations. New Mexico alleges that the Special Master's reasoning was in error because he need not have addressed certain issues and doing so exceeded what was necessary to resolve a Rule 12(b)(6) motion. The issues New Mexico focuses upon in its Exceptions, however, were all raised by New Mexico in its Motion to Dismiss. The manner in which New Mexico argued its Motion placed the legal interpretation of the 1938 Compact squarely at issue.

In its Motion to Dismiss, New Mexico argued that Texas failed to state a claim because Texas failed to establish that "any term of the Compact imposes a duty on New Mexico either to deliver water at the New Mexico-Texas stateline or to prevent diversions of water after New Mexico has delivered it at Elephant Butte Reservoir." N.M. Mot. at 28. It contended that Texas's claim fails because there is no "implied covenant" in the Compact requiring New Mexico to prevent diversion of Project water after New Mexico delivers water to Elephant Butte Reservoir. N.M. Mot. at 36-40. New Mexico insisted

that delivering water into the Rio Grande Project "is not a relinquishment of sovereignty." New Mexico's Reply to Opposition to Motion to Dismiss (N.M. Reply) at 14. New Mexico maintained that state law controls the distribution of water below Elephant Butte Reservoir, that the "legal regime governing the [reclamation] Project was well understood at the time the Compact was executed," and that "the Compact does not expressly or implicitly modify this regime." N.M. Reply at 18. *See also* N.M. Reply at 9 ("Texas and the United States improperly presume that the Compact overrides the mandate in the Reclamation Act of 1902" to defer to state water law).

New Mexico presented these legal arguments to the Special Master, and as the Court asked him to do, the Special Master analyzed the legal arguments and made a recommendation in his First Report. In recommending denying the New Mexico motion, the Special Master explained that he was required to interpret the plain text and structure of the Compact as well as consider the effect of the Compact's equitable apportionment on state law appropriations granted by New Mexico. Contrary to New Mexico's assertion regarding the extent of its delivery obligation, the Special Master concluded that the 1938 Compact requires New Mexico to relinquish control over the water it delivers to Elephant Butte Reservoir. First Report at 195-209. Contrary to New Mexico's assertion regarding the legal regime below Elephant Butte Reservoir, the Special Master concluded that the equitable apportionment achieved by the Compact overrides Congress's command in the

Reclamation Act of 1902 that state law govern the distribution of Compact water. First Report at 210-17. And contrary to New Mexico's assertion that it has total sovereignty over all waters below Elephant Butte Reservoir notwithstanding the existence of the Compact, the Special Master concluded that the doctrine of equitable apportionment governs the apportionment of water between the states and delivery to Texas, not New Mexico law.

In its exceptions to the First Report, New Mexico not only reasserts the significance of these major legal issues, but reargues and repeats the substance of the arguments made in its Motion. In noting "the point" behind its now abandoned Motion, it explains that the reason it brought the Motion was to argue that, "under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that the remedies for any dispute below the reservoir arise under reclamation and state law."[3] N.M. Exceptions at 16, n.7. The Special Master cannot be criticized for directly addressing the "point" of the New Mexico Motion.

The Special Master addressed the legal arguments without resorting to factual allegations or fact findings. He recited the Rule 12(b)(6) standard of review, which required him to assume all factual

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[3] New Mexico's citation, *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), to support its contention that Compact remedies below Elephant Butte Reservoir arise under Reclamation law or state law is not on point because the contention is not supported in the case itself.

allegations from Texas's and the United States' complaints to be true. First Report at 191, 193. Each of his conclusions is legal and can be adopted by this Court. *See Simmons v. Galvin*, 575 F.3d 24, 30 (1st Cir. 2009) ("questions of statutory interpretation are questions of law ripe for resolution at the pleadings stage"); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) ("the determination of whether contract language is ambiguous is a question of law"). As noted in his First Report, the Special Master found that:

> If the Court accepts my recommendations, the next step in the case will be discovery. This is an appropriate time for the Court to examine and consider the issues that have arisen in the case to date. New Mexico's motion to dismiss presents major legal issues that are critical to the ultimate resolution of the matter; its outcome will immediately shape the scope of discovery moving forward and may encourage settlement discussions among the parties.

First Report at 4. Proceeding as the Special Master recommends will give effect to his prodigious effort leading to his First Report and define the scope of discovery and the remaining issues that will need to be dealt with in this case. *See Chudasama v. Mazda Motor Corp.* 123 F.3d 1353, 1368-69 (11th Cir. 1997) (reasoning that eliminating non-meritorious claims in

a motion to dismiss serves to properly focus the scope of discovery and promotes judicial economy).

Texas requests that this Court accept and adopt the major legal resolutions that are critical to the ultimate resolution of the case that were affirmatively addressed by the Special Master as support for the recommendation that the New Mexico Motion to Dismiss the Texas Complaint be denied. New Mexico should not be able to re-litigate these legal issues at later stages in the litigation simply because it now accedes to the denial of its Motion to Dismiss.

The legal issues that New Mexico continues to assert in its exceptions and that the Special Master recommended be resolved against New Mexico in his First Report are further discussed below.

B. New Mexico's Compact Obligations Are Clear and Unambiguous Based on the Compact Language, and the Special Master's Determination Should Be Upheld

As noted above, New Mexico frames "the point" of its Motion to Dismiss as being: "to argue that under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and [New Mexico] state law . . . ." N.M. Exceptions at 16 n.7. New Mexico's fundamental premise in its Motion to Dismiss was and still is that

the Compact's plain, unambiguous text does not support Texas's Complaint. New Mexico argues that Texas, in its Complaint, failed to identify any express term of the Compact requiring New Mexico to ensure that water apportioned to Texas pursuant to the Compact reaches the Texas state line. New Mexico further contends that Texas failed to identify any express term of the Compact that modifies the "background understanding" and "bedrock principle" that reclamation law, and hence state law, governs the distribution of Project water. N.M. Reply at 11. Notwithstanding the abandonment of its Motion to Dismiss, New Mexico reargues the substance of these points in its Exceptions.

To make a recommendation on the New Mexico Motion to Dismiss, the Special Master was compelled to interpret the plain language of the 1938 Compact. The Special Master started and ended his inquiry by reviewing the four corners of the Compact and concluded that the plain text and structure of the 1938 Compact do not support New Mexico's position. He then provided a provision-by-relevant-provision analysis of the plain text and structure of the Compact, all of which was directly relevant and responsive to the arguments made by New Mexico.

First, he interpreted the plain language of Article IV of the Compact and focused on the operative word "deliver." Using a contemporary definition of that word, he concluded that the 1938 Compact pairs the "obligation . . . to deliver water" with the mandatory term "shall" to connect the duty to

relinquish control with certain volumes of water identified in the delivery schedules.[4] "Thus, the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." First Report at 197. New Mexico's duties to relinquish control of the water at Elephant Butte and refrain from post-Compact depletions of water below Elephant Butte Reservoir do not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact.[5] First Report at 196-98.

The Special Master then analyzed other provisions and the structure of the 1938 Compact and

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[4] This definition of the word "deliver" is identical to how all Parties, including New Mexico, use the same word when explaining its meaning as it relates to Colorado's Article III obligation to deliver water to the Colorado-New Mexico state line.

[5] New Mexico makes oblique reference to *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), regarding purported interpretations of the Compact and its relationship to rights below Elephant Butte Reservoir. *See, e.g.*, N.M. Exceptions at 7, 16 n.7. Texas was not a party to this case, and its sovereign rights were not implicated. Discussion of the Compact by the district court was *dicta*. In that *dicta* related to a jurisdictional defense posed by New Mexico, the district court stated that nothing in its decision meant that New Mexico, having made its delivery to Elephant Butte Reservoir, could undermine that delivery by pumping down the surface flows of the river below the point of delivery. *City of El Paso*, 563 F. Supp. at 386. Notwithstanding that this language was *dicta*, it is certainly consistent with the Special Master's conclusion that New Mexico could not undermine its delivery of water into Elephant Butte Reservoir by allowing downstream pumping.

concluded that the Compact protects releases from Elephant Butte Reservoir in addition to providing for deliveries into Elephant Butte Reservoir. The Special Master noted the definitions of the terms "Usable Water" and "Project Storage" in Article I, as well as the requirement for an annual computation of all credits and debits of Colorado and New Mexico in Article VI. Further, the Special Master described Articles VI, VII, and VIII. Under Article VI, subject to certain qualifications, New Mexico must retain water in storage in reservoirs constructed after 1929. Under Article VII, neither New Mexico nor Colorado shall increase water in storage in reservoirs constructed after 1929 when there is less than 400,000 acre feet of Usable Water in Project Storage, except when actual releases of Usable Water average more than 790,000 acre-feet per year. And under Article VIII, at the beginning of each year, Texas may demand that New Mexico release water from storage in reservoirs constructed after 1929 in the amount of the accrued debits of New Mexico at "the greatest rate practicable" to bring the quantity of Usable Water in Project Storage to 600,000 acre-feet by March 1 and maintain this quantity so that a normal release of 790,000 acre-feet can be made from Project Storage that year.[6]

The reason the 1938 Compact integrated the Rio Grande Project into its apportionment scheme was that by relying upon the Rio Grande Project, the states would obtain the storage benefits associated with Elephant Butte Reservoir, the return flows from

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[6] *See also* Texas Opp'n at 30-33, 39-40.

the irrigation of lands within New Mexico, and accretions to the Rio Grande below Elephant Butte Reservoir, including tributary groundwater. In 1938, the water of the Rio Grande was fully subscribed, and the only way to ensure that Texas obtained its apportioned water was to include Project water return flows and all tributary flows below Elephant Butte Reservoir in the apportionment calculations. The total supply, used only once, did not meet the needs of New Mexico, Mexico and Texas.

In other words, *more than* the 100 percent of water available at Elephant Butte Reservoir is necessary to meet the full Mexico treaty obligation and the 1938 Compact apportionment. The delivery schedule in Article IV of the 1938 Compact was negotiated and predicated on the quantity of water delivered into Elephant Butte Reservoir being used and reused within the Rio Grande Project, and credit all tributary flows below the Reservoir. Thus, a normal release of 790,000 acre-feet, which the 1938 Compact was designed to protect, results in approximately 950,000 acre-feet that is available for diversion to irrigate Rio Grande Project lands in Texas and New Mexico, and to meet the treaty obligations with Mexico. *See* Texas Opp'n at 12. New Mexico's obligation to "deliver" water to Texas at Elephant Butte Reservoir allowed this to work. The alternative would have been to require New Mexico to release more water from the Middle Rio Grande to make up the deficit that would otherwise have existed in the Texas apportionment. *See* Texas Compl. ¶ 18.

Considering all of these provisions and "interplay between the articles of the 1938 Compact," and "specifically Articles I-IV, VI, VII, and VIII," the Special Master found that the 1938 Compact protects water deliveries to the Project and also "protects the water that is released from Elephant Butte." First Report at 200.

The Special Master confirmed his interpretation of the Compact by measuring New Mexico's arguments against rules of statutory construction:

> [A]cceptance of New Mexico's reading of the 1938 Compact would require me to violate "a cardinal rule of statutory construction" which requires me to avoid construing the Compact in such way that renders entire articles "superfluous, void or insignificant." Indeed, conversely, New Mexico has identified in its pleadings and at oral argument *no* provision of the 1938 Compact that would allow it to recapture water it has delivered to the Rio Grande Project upon release from the Elephant Butte Reservoir.

First Report at 202 (citation omitted). Additionally, the Special Master reasoned that "New Mexico's narrow reading of the Compact also leaves the question of Texas's equitable apportionment under the Compact an open source of controversy." First

Report at 202-03. Recognizing that New Mexico's interpretation of the Compact would defeat the Compact's express purpose, the Special Master rejected New Mexico's "stunted interpretation" of the Compact. First Report at 203.

New Mexico's obligations under the Compact are more than just the delivery schedule in Article IV; they are "woven throughout the 1938 Compact." First Report at 201. As the Special Master recognized, Articles I, II, III, IV, VI, VII, and VIII all control the administration of the Compact, providing for a sufficient amount of water delivered into Elephant Butte Reservoir to achieve a normal release of 790,000 acre-feet, and protecting the release of water from Elephant Butte Reservoir "in order for it to reach its intended destination." First Report at 200. The Special Master's interpretation treats the Compact as a "comprehensive agreement." First Report at 201; *see also id.* at 203 (intending a "holistic reading of the Compact by which each Article is given meaning and purpose"). The Special Master's analysis is consistent with rules of interpretation and should be adopted by the Court. *See* First Report at 192-93 (reciting rules of construction); Texas Opp'n at 16-17 (same).

C. The Special Master Correctly Concluded that the Doctrine of Equitable Apportionment, Not State Law, Controls the Distribution of Water Below Elephant Butte Reservoir

New Mexico is critical of the First Report because New Mexico argues that New Mexico state law should govern how and if water is delivered to Texas. Again, resolution of this question requires the application of law, not facts. New Mexico concedes that Texas received an equitable apportionment of the Rio Grande water through the 1938 Compact. New Mexico also concedes that the signatory States to the 1938 Compact allocated Texas's equitable apportionment to the Rio Grande Project. First Report at 210-11. Notwithstanding these concessions, New Mexico asserts that it may intercept and divert water leaving the Reservoir "before it crosses the New Mexico-Texas state line because that water—and indeed the entire administration for the Rio Grande Project within New Mexico—is governed by New Mexico state water law." First Report at 211. The Special Master properly rejects this assertion as being at odds with the entire legal concept of equitable apportionment by Compact: ". . . New Mexico's argument regarding its duties under the 1938 Compact ignores the effect that equitable apportionment via compact has upon all other prior appropriations granted by state law." First Report at 211.

The Special Master aptly summarized the doctrine of equitable apportionment in the First Report. First Report at 23-31. "Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). "Apportionment calls for the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. 589 at 618. "The doctrine of equitable apportionment is neither dependent on nor bound by existing legal rights to the resource being apportioned." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). "[S]trict adherence to the priority rule may not be possible. . . ." *Nebraska v. Wyoming*, 325 U.S. at 618; *see also Colorado v. New Mexico*, 459 U.S. at 184 (explaining that "state law is not controlling" in an equitable apportionment and the "just apportionment of interstate waters is a question of federal law that depends 'upon a consideration of the pertinent laws of the contending States and *all other relevant facts*' " (internal citation omitted)). Further, under the doctrine of equitable apportionment, "States have an affirmative duty . . . to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Idaho ex rel. Evans v. Oregon*, 462 U.S at 1025.

When sovereign states accomplish an equitable apportionment by interstate compact, rather than by a judicial decree of the Court, they "bargain[ ] for those rights [under the compact] in the shadow of [the

Court's] equitable apportionment power – that is [the Court's] capacity to prevent one State from taking advantage of another." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). "Each State's right to invoke the original jurisdiction of th[e] Court [is] an important part of the context in which any compact is made." *Id.* (internal citation and quotation omitted).

Here, the 1938 Compact represents the negotiation and agreement between the "State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State" and "for the purpose of effecting an equitable apportionment." First Report at A-1 (preamble of 1938 Compact). To achieve this equitable apportionment, the Special Master explained that "the 1938 Compact commits the water New Mexico deliver to Elephant Butte Reservoir to the Rio Grande Project." First Report at 211." The apportioned water committed to the Project "is not subject to appropriation or distribution under New Mexico state law. *Id.* "That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication take priority over all other appropriations granted by New Mexico." First Report at 213.

New Mexico's contorted argument that New Mexico state law applies to Texas's Compact apportionment delivered through the Project has always missed the point: the Compact is an equitable

apportionment. An equitable apportionment is different than an intrastate, prior appropriation scheme administered by a single state. This Court has recognized the necessity of invoking and applying equitable principles to interstate stream conflicts between sovereigns as early as 1907 in *Kansas v. Colorado*, 206 U.S. 46 (1907). The Court has consistently applied the doctrine of equitable apportionment in resolving disputes between states, such as this one. *See* First Report at 23-31 (summarizing cases). And the Court has acknowledged the use of its original jurisdiction to enforce the terms of an equitable apportionment achieved by compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1052; First Report at 27-28, 216. The Special Master's determination on this legal issue accounts for this jurisprudence and correctly identifies the legal regime governing the delivery and distribution of Texas's compact apportionment as the doctrine of equitable apportionment, not New Mexico state law.

D. The Special Master Correctly Found That New Mexico's Jurisdiction Below Elephant Butte Reservoir Was Constrained by the Compact

New Mexico has mischaracterized the Special Master's conclusions as stripping New Mexico of jurisdiction below Elephant Butte Reservoir. What the Special Master's actually concluded is that "New Mexico state law does not govern the *distribution* of water apportioned by Compact." First Report at 216 (emphasis added). New Mexico cannot exercise its

jurisdiction in a manner that avoids its Compact obligations by affecting the distribution or delivery of water that has been apportioned to Texas, which, by necessity, includes Rio Grande Project return flows and tributary flows that are needed for Texas to obtain its apportioned water. The Special Master recognized New Mexico's jurisdiction by citing to New Mexico statutes requiring compliance with interstate compact deliveries. First Report at 216 (citing N.M. STAT. ANN. §§ 72-2-9.1(A), 72-14-3.1(B)(6); *Montgomery v. Lomos Altos, Inc.*, 150 P.3d 971, 976 (N.M. 2006) (discussing rules promulgated by the Office of the State Engineer to ensure compliance with compacts, including the 1938 Compact)); *see also* First Report at 214-16 (citing *In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*, 674 P.2d 914 (Colo. 1983) (*In re Rules and Regulations*) (discussing rules promulgated by Colorado state engineer limiting surface and groundwater use in San Luis Valley to meet Colorado's 1938 Compact obligations)).

New Mexico conflates the Special Master's determination on the equitable apportionment regime below Elephant Butte into an argument that the Special Master's views, if accepted, will crater the foundation of western water law. As explained below, this argument is flawed.

1. New Mexico's Arguments Regarding the Application of Reclamation Law Ignore the Fact There Is a Compact

New Mexico concedes that Texas received an equitable apportionment of the Rio Grande through the Compact and that the Rio Grande Project was the vehicle by which the compacting states chose to deliver that apportioned water. First Report at 210-11. New Mexico then proceeds to ignore the Compact and focus its attention solely on the Rio Grande Reclamation Project and the Project's water rights.

New Mexico presents a history of the Lower Rio Grande where the United States filed for appropriative water rights; the United States built and operated the reclamation Project and then entered into reclamation contracts with irrigation districts for Project water; and once an adjudication of the basin in which the Project was located was initiated, pursuant to the McCarran Amendment, the United States participated in the adjudication to defend the priority of the Project's water rights from junior appropriators. *See, e.g.*, N.M. Exceptions at 35. Grounded in this focus on the Reclamation Project, New Mexico persists in its argument that by operation of Section 8 of the 1902 Reclamation Act,[7]

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[7] The problems with New Mexico's assertions regarding the application of Section 8 of the 1902 Reclamation Act and its interpretation of *California v. United States*, 438 U.S. 645 (1978), are further briefed in Texas's Opposition to the Motion to Dismiss. *See* Texas Opp'n at 56-59.

water stored and released from Elephant Butte Reservoir is subject to administration by the State of New Mexico and subject to New Mexico state law. It further argues that because of Section 8 of the 1902 Reclamation Act and the McCarran Amendment, Texas's sole remedy for redress of its Compact complaints are with the New Mexico State Engineer or the New Mexico Adjudication Court. N.M. Exceptions at 35-42.

What is missing from New Mexico's world view is a recognition that an interstate compact exists and affects the administration of the same water. This failure to recognize the effect of the 1938 Compact is highlighted in New Mexico's Exceptions:

> New Mexico had already been 'delivering' water to the Project for more than two decades when the Compact was adopted. The only change effected by Article IV was to fix the manner in which the amount of water to be delivered to the Project was calculated. There is no indication in the plain language of the Compact that by agreeing to continue something it was already doing, New Mexico agreed to cede its ownership of the water it delivered . . . .

N.M. Exceptions at 21-22. Yet, the existence of the 1938 Compact means that the doctrine of equitable apportionment applies, which takes precedence over ordinary reclamation law, including Section 8 of the

1902 Reclamation Act. The existence of the Compact means that the water available in New Mexico for appropriation by New Mexico citizens is limited to New Mexico's apportionment and does not include the water apportioned to other Compact states. This same effect is true for Colorado. As this Court stated in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (*Hinderlider*), equitable apportionment by Compact "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Id.* at 106; *see also* First Report at 213.

New Mexico's ignorance of the Compact also explains its treatment of Texas like any other water user in New Mexico. New Mexico has argued that Texas must rely on the priority of the Project's water rights under New Mexico state law, that Texas must enforce those water rights and seek remedy for any injury in New Mexico state venues, and that New Mexico owns the water apportioned to Texas and only granted a usufructory right to the Project. *See, e.g.*, N.M. Exceptions at 38-42, N.M. Mot. To Dismiss at 52-58. These arguments completely disregard that Texas, as a sovereign, is entitled to the equitable apportionment agreed to by three sovereign states and approved by Congress. *See Hinderlider*, 304 U.S. at 105-08 (describing the nature of an equitable apportionment by compact); *see also Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) ("The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her

boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained.").

For all these reasons, New Mexico's position is untenable. If its argument were correct, there would be no distinction between the administration of the Lower Rio Grande before and after the effective date of the Compact, and the purpose of the Compact would be completely defeated. The Special Master properly rejected New Mexico's position.

2. New Mexico's Reliance on *Tarrant* Is Misplaced Because the Compact Is Not Silent on Equitable Apportionment

In *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) (*Tarrant*), a Texas water district argued it had the right, under the Red River Compact, to cross the state line and appropriate Red River water within Oklahoma's borders for use in Texas. New Mexico asserts that "similar circumstances" are present in this case. N.M. Exceptions at 27. However, Texas does not seek to appropriate water in New Mexico or reach across the border into that state. Rather, Texas only seeks to protect its equitable apportionment, which is delivered through the administration of the Project. There is no violation of any Supreme Court principle concerning state sovereignty.

A compact's express terms are "the best indication of the intent of the parties." *Tarrant*, 133 S. Ct. at 2130. In the instant case, the express terms of the Compact support the Special Master's conclusions. The terms of the Compact provide that three sovereign states agreed to an equitable apportionment of an interstate stream, which Congress approved. Thus, the Compact is not silent on what occurs below Elephant Butte Reservoir. The law of equitable apportionment applies because the Compact expressly apportions Rio Grande water and then used the Project as the "sole method" for distributing that equitable apportionment to New Mexico, Texas, and Mexico. First Report at 201. Likewise, the Compact is not silent on what occurs below Elephant Butte Reservoir when it expressly provides for New Mexico's obligation to "deliver" water at Elephant Butte. Neither New Mexico nor its citizens can take back or attempt to reassert control under state processes over water apportioned to Texas. First Report at 197.

3. *Hinderlider* and *In re Rules & Regulations* Support Texas's Position

Contrary to New Mexico's assertion, the Supreme Court's decision in *Hinderlider*, and the Colorado Supreme Court's decision in *In re Rules &*

Regulations,[8] support the Special Master's ruling and rationale. In *Hinderlider*, the Supreme Court held that Colorado could not confer upon a ditch company, with state decreed rights pre-existing an interstate compact, "rights in excess of Colorado's share of the water of the stream, and its share was only an equitable apportionment thereof." *Hinderlider*, 304 U.S. at 102. The Court further held that "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted water rights before it entered the compact." *Id.* at 106. The equitable apportionment doctrine under *Hinderlider* provides that "state law applies only to the water which has not been committed to other states by equitable apportionment." *Id.* at 106-08; First Report at 206. This holding flatly contradicts New Mexico's position that it may conduct a state law adjudication of rights to water that has already been equitably apportioned under the Rio Grande Compact.

The holding in *In re Rules & Regulations* also contradicts New Mexico's position. In that case, the Colorado Supreme Court upheld Colorado State Engineer rules providing for separate administration of the Conejos and Rio Grande rivers pursuant to the 1938 Compact. The court found that such administration was supported by the plain language of the Compact, which was clear on its face. *In re Rules & Regulations*, 674 P.2d at 925. In the instant

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[8] New Mexico cites to this same case as *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983). Herein, Texas uses the case name as cited by the Special Master.

case, the 1938 Compact's plain language requires New Mexico to "deliver" water into Elephant Butte Reservoir. The language does not support the argument that the water delivered can be both equitably apportioned to Texas under the Compact and also adjudicated for uses under New Mexico state law.

Moreover, the *Hinderlider* and *In re Rules & Regulations* cases are further distinguishable because these cases involved intrastate allocation disputes between parties within Colorado. By contrast, the dispute in the instant case is over interstate apportionment of water between Texas and New Mexico.

Indeed, the overall holding of the *Hinderlider* case that an interstate compact is binding upon the citizens of a state, even where the state conferred water rights under state law before entering into the compact, supports the Special Master's findings and Texas's position in this case. New Mexico does not have the legal authority to administer or adjudicate rights under state law to water that has been equitably apportioned to Texas under the Rio Grande Compact. Once New Mexico has delivered that apportioned water to Elephant Butte Reservoir, it has relinquished jurisdiction over the distribution of that water, as the Special Master properly held.

4. Usufructory Rights Are Subject to Equitable Apportionment

New Mexico argues that the Special Master's interpretation of the Compact improperly ignores the concept of a "usufruct" in water rights law in the manner it defines the word "deliver," presumably arguing that one cannot "deliver" a "use" and that only the state can own a "property" right to water. This argument, however, obfuscates interpretation of the Compact.

That water rights are considered usufructory does not make them any less of a real property interest, or somehow not subject to equitable apportionment. The usufructory nature of water rights is simply a recognition that one cannot own the corpus of the water while it is in the natural stream channel. As this Court has explained:

> While the right to its use . . . may become a property right, yet the water itself, the corpus of the stream, never. . . can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water can be acquired. . . . Neither sovereign nor subject can acquire anything more than a mere usufructory right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops . . . ."

Federal Power Comm'n v. Niagra Mohawk Power Corp., 347 U.S. 239, 247, n.10 (1954) (emphasis added). Consistent with this recognition, New Mexico's constitution provides that "[t]he unappropriated water of every natural stream" within the state is "declared to belong to the public." N.M. CONST. ART. XVI, § 2.

As a matter of interstate compact interpretation, New Mexico's apparent argument, that it has a property right in water and not just a usufruct, treats New Mexico differently than it does Texas. It ignores the clear meaning of the same language in Article III with respect to the "delivery" of water by Colorado to New Mexico. Somehow, under New Mexico's interpretation, New Mexico gets something different from Colorado than what Texas gets from New Mexico. *Compare* N.M. CONST. ART. XVI, §§ 2-3, *with* TEX. WATER CODE §§ 11.021, 11.022. Under the Compact, it does not matter if the water itself or the right to use water is owned by the state to which it has been apportioned. Water apportioned pursuant to a compact, in the amounts specified in the compact, is the property of the respective states by interstate agreement. What each state has is more than a mere right of use pursuant to state law—it is an equitable apportionment. The usufructory nature of water rights throughout the western states does not make for a special case in New Mexico, and nothing about the Special Master's Compact interpretation violates any principle of western water law.

E. The Special Master Did Not Make Factual Findings

New Mexico takes the odd position of accepting the Special Master's determination to deny New Mexico's motion, but not its legal reasoning. This position, and that of the *amici curiae* and the State of Colorado is based, in part, on the argument that the Special Master made factual conclusions based upon his independent analysis of extrinsic materials that were not tested through the evidentiary rigors of a trial.[9] While Texas is not certain why one would want to contest all the background information that the Special Master has provided in his First Report, Texas does not dispute that factual "findings" are subject to trial at the appropriate time in this case.

More importantly, in presenting these arguments, New Mexico, Colorado and the New Mexico *amici* inexcusably ignore the Special Master's express statements that he made no factual findings in making his recommendations and did not rely on the extrinsic materials in making his ultimate recommendations. "[N]othing detailed [in the Report] should be construed as fact finding violative of Fed. R.

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[9] The argument itself is puzzling given the fact that New Mexico lodged almost 900 pages of extrinsic factual and legal materials and relied upon factual assertions in a law review article in support of its Motion. Moreover, it continues to cite extrinsic materials in support of its Exceptions, thus doing exactly what it criticizes the Special Master for doing. See, e.g., N.M. Exceptions at 1, n.1, where New Mexico offers brief factual statements for "context" and then refers to previously lodged materials. This issue is addressed further, *infra*.

Civ. P. 12, as nothing in the historical record was dispositive regarding ultimate recommendations of the report." First Report at 193. All the determinations by the Special Master are based upon a legal review of the plain language and structure of the 1938 Compact, which, citing *Kansas v. Colorado*, 514 U.S. 673 (1995), made unnecessary any factual inquiry into the purpose or history of the 1938 Compact.

Moreover, the Special Master noted that his reference to factual materials and historic documents was solely for the purpose of providing context, consistent with this Court's decision in *Arizona v. California*, 373 U.S. 546, 552 (1963). First Report at 193; *see also* First Report at 8, 32. Unless the Special Master cannot be taken at his word, there are no factual "findings" in the Report.

F. The United States' Complaint

1. The Special Master's Recommendation on New Mexico's Motion to Dismiss the United States' Complaint

Regarding the U.S. Complaint, the Special Master recommends that the Supreme Court rule that the United States cannot state a claim under the 1938 Compact, but that the Court should nevertheless exercise its discretion to extend its original, but not exclusive, jurisdiction under 28 U.S.C. § 1251(b)(2) to

hear the United States' Rio Grande Project claims against New Mexico. First Report at 237.

2. Other Parties' Positions on the Special Master's Recommendations Regarding the United States' Complaint

The United States takes exception to the Special Master's conclusion that its Complaint in Intervention does not state a claim under the Compact, and requests that the Court reject the Special Master's recommendation that its Complaint in Intervention be dismissed. Exception of the United States and Brief in Support of Exception (U.S. Exceptions) at 48. The United States argues that it is entitled to the relief sought because (1) the Compact is a federal statute that protects specific federal interests, namely the United States' ability to fulfill its obligations under its treaty with Mexico, as well as its contracts with EBID and EPCWID; and (2) the United States is an intended third party beneficiary of the Compact. U.S. Exceptions at 28-31. Not addressed in the United States' exceptions is the Special Master's recommendation that the Court utilize its original, but not exclusive, jurisdiction under 28 U.S.C. § 1251(b)(2), to hear the United States' claims against New Mexico, to the extent the United States has stated plausible claims under the 1902 Reclamation Act. First Report at 237.

New Mexico did not file exceptions to the Special Master's conclusion or recommendation with regard to the United States' claims. N.M. Exceptions at 56. However, New Mexico urges the Court to limit the United States' participation in this action to the "narrow questions" posed in the U.S. Complaint related to Reclamation Law. N.M. Exceptions at 57. Although New Mexico acknowledges that the United States' participation "is indispensable to resolution" of the dispute, New Mexico does not want the Court to allow the United States the opportunity to relitigate "settled issues regarding the nature and scope of its Project right." N.M. Exceptions at 56 & n.15.

Colorado's exceptions also assert that the United States' participation be limited, specifically to the United States' claims related to the 1906 Convention with Mexico. State of Colorado's Exceptions to the First Interim Report of the Special Master (Colo. Exceptions) at 5. Colorado did file an exception to the Special Master's recommendation that the Court utilize its original, non-exclusive jurisdiction to decide "other claims that are not based on the 1906 Convention." Colo. Exceptions at 5. Colorado argues that these "other claims . . . are more properly resolved under the rubric of the Compact by the States." Colo. Exceptions at 5.

3. Texas's Position

Texas supports the claims asserted by the United States to the extent they are Compact claims related to the equitable apportionment made

thereunder. As the First Report explains, the Compact utilizes the Rio Grande Project, operated by the United States, "as the single vehicle by which to apportion" Rio Grande water to Texas and New Mexico. First Report at 219. The Rio Grande Project is charged with delivering the Compact's equitable apportionment to Texas and New Mexico. In other words, the United States acts as the "agent" of the Compact, charged with assuring that the Compact's equitable apportionment is, in fact, made. Thus, it would be appropriate for the United States' claims under the Compact to be included in this proceeding, as Project operator, to ensure that apportioned water in Elephant Butte Reservoir is delivered according to the terms of the Compact.

However, to the extent that the United States' Complaint can be read to include claims asserted under Reclamation Law that are distinct from the apportionment achieved by the 1938 Compact, those claims should not be allowed to detract from the claims stated under the Compact. In particular, claims raised under Section 8 of the Reclamation Act are superseded by the Compact and determinations made by the New Mexico Adjudication Court are irrelevant to Texas's Compact claims as well as the Compact claims made by the United States. The Special Master rightfully found that the doctrine of equitable apportionment, sourced in federal common law, governs disputes between states concerning their rights to use the water of an interstate stream. First Report at 25. Therefore, the doctrine of equitable apportionment, not Reclamation Law, governs the

Project's delivery of apportioned water to Texas and New Mexico (i.e., the distribution of water below Elephant Butte Reservoir).

Once all of those Compact issues are resolved by the Special Master and this Court, residual issues, if any, pursuant to Reclamation law can be properly addressed. Reclamation Law related to the Project might involve repayment obligations (which have already been fulfilled), or operation and maintenance obligations imposed on the contractors pursuant to their contracts with the United States. These claims are distinct from the United States' Compact obligation to operate the Rio Grande Project to distribute the water apportioned under the Compact and New Mexico's interference with that obligation.

G. The Arguments Raised by *Amici Curiae* Should Be Rejected

1. The Arguments Raised by Las Cruces and the Water Authority Are Inconsistent with New Mexico's Position and Improperly Introduce Factual Issues

Several *amici curiae* filed briefs in support of New Mexico's positions. As political subdivisions of the State of New Mexico, the *amicus curiae* briefs of Las Cruces and the Water Authority were

automatically filed with the Court.[10] Unlike the State of New Mexico, Las Cruces and the Water Authority argue that this Court should reject the First Report. The positions of these *amici* lack merit.

Both *amici* argue that the Special Master improperly relied on extrinsic evidence and should have made a "narrow ruling" on New Mexico's Motion to Dismiss.[11] *See* City of Las Cruces' *Amicus Curiae* Brief in Support of New Mexico's Exceptions to the First Interim Report of the Special Master (Las Cruces Br.) at 15-20; Water Authority Br. at 16-23. As explained in above, the Special Master ruled on the arguments presented in New Mexico's motion to

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[10] Under Supreme Court Rule 37.4, neither a motion nor Texas's consent is required in order for Las Cruces and the Water Authority to file these briefs. If consent were required, Texas would not have given it. Likewise, if a motion for leave to file were required, Texas would have opposed. The briefs filed by Las Cruces and the Water Authority amount to 78 additional pages of briefing to which Texas must respond, and mostly duplicate New Mexico's arguments regarding the purported application of state law to Texas's apportionment under the 1938 Compact and the Special Master's references to extrinsic materials. The Water Authority's *amicus* brief does, however, underscore and evidence the fact that Compact compliance is a New Mexico state-wide obligation not limited to areas below Elephant Butte Reservoir.

[11] Like New Mexico, *see supra* note 9, at the same time that it criticizes the Special Master for relying on extrinsic materials, the Water Authority cites to extrinsic materials to support its arguments. *See, e.g.*, Albuquerque Bernalillo County Water Utility Authority's *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master (Water Authority Br.) at 26.

dismiss, which required the Special Master to interpret the 1938 Compact and New Mexico's obligations with respect to the delivery of Texas's apportionment. *See supra* pp. 10-15. The Special Master's findings on the legal issues raised in New Mexico's motions were not "premature," as Las Cruces suggests. *See* Las Cruces Br. at 18, 38.

Further, despite its objection to what it considers factual determinations, Las Cruces argues that the Special Master failed to consider the previous lawsuits related to the Lower Rio Grande and that Texas is barred from raising the claims in its Complaint because of its alleged "post decree acquiescence." *See* Las Cruces' Br. at 21-29. This argument amounts to a laches defense. *See Menominee Indian Tribe of Wis. v. United States*, 6514 F.3d 519, 531 (D.C. Cir. 2010) (explaining that the "equitable defense of laches 'is designed to promote diligence and prevent enforcement of stale claims' by those who have 'slumber[ed] on their rights' " (citation omitted)). It is inappropriate to resolve laches claims on a motion to dismiss as the defense typically involves factual issues. *See id.* at 532; *see also Walden v. City of Chicago*, 391 F. Supp. 2d 660, 681 (N.D. Ill. 2005) (listing authorities). Las Cruces is asking the Court to do what it criticizes the Special Master of doing—reach factual issues prematurely on a motion to dismiss.

Additionally, the argument that Texas's claims are barred based on its alleged post-decree acquiescence was neither raised by New Mexico nor

presented to the Special Master during the briefing on the Motion to Dismiss or comments on the draft report. New Mexico never argued that Texas' claim should be dismissed on the ground of "post-decree acquiescence," or other preclusion-based principles. Similarly, New Mexico did not file exceptions to the Special Master's recommendation on New Mexico's Motion to Dismiss the United States' Complaint. *See* N.M. Exceptions at 2-3 (asking the Court to enter order adopting the Special Master's recommendation to extend jurisdiction to the United States' claims while precluding the United States from relitigating its water rights for the Project); *see also id.* at 56-58. Las Cruces and the Water Authority's arguments that are inconsistent with the positions taken by New Mexico are inappropriate. *See New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (although arguments of *amici* and the party are based on the same article of the compact, the court "must pass over the arguments of the named [*amici*] for the reason that . . . the party to the case [ ] has in effect renounced them . . ."); *Eldred v. Ashcroft*, 255 F.3d 849, 850-51 (D.C. Cir. 2001) (declining to reach the merits of the *amicus*'s position which was not raised by the parties to the case).

The Water Authority also argues that the Special Master's findings create a conflict between a flexible delivery obligation upstream of Elephant Butte Reservoir under Articles III, IV, and VI of the 1938 Compact, and what the Water Authority interprets as a fixed state line delivery obligation below Elephant Butte Reservoir. However, the

Special Master's determinations do not affect the delivery schedules in Articles III and IV of the Compact. The Special Master carefully recounted that accounting structure required under the Compact, including the "detailed schedules in Articles III and IV." First Report at 199-200. He found that the "1938 Compact is a comprehensive agreement, the text and structure of which . . . provides a detailed system of accountability to ensure that each State continues to receive its equitable share." First Report at 201.

Likewise, the Special Master did not create a fixed state line delivery obligation below Elephant Butte Reservoir. The Special Master only acknowledged that the Compact was intended to protect the operation of the Project, as Texas alleged in its Complaint. *See, e.g.*, First Report at 195, 198-201. The Water Authority's argument attempts to create a conflict in Compact administration where none exists, and should be rejected by the Court.

2. The Motions for Leave to File and Brief of *Amicus Curiae* New Mexico State University and New Mexico Pecan Growers Should Be Denied

a. Motions for Leave to File *Amicus Curiae* Briefs Are Not Favored

New Mexico State University (NMSU) and New Mexico Pecan Growers (NMPG) each move

separately pursuant to Supreme Court Rule 37.2(b) for leave to file an *amicus curiae* brief in support of New Mexico. Texas was advised of these requests and did not consent to the filing of the briefs. When a party withholds consent, a motion for leave to file an *amicus curiae* brief is a mandatory prerequisite to filing. Pursuant to the express terms of the Rule, "[s]uch a motion is not favored." Rule 37.2(b).

b. Legal Standard for Motion for Leave to File an *Amicus Curiae* Brief

The purpose of an *amicus curiae* brief is to bring relevant matter to the attention of the Court "not already brought to its attention by the parties . . . ." Rule 37.2(a). "An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." *Ibid.* An *amicus curiae* brief should only be allowed by the Court when (1) a party is not represented competently by counsel, or not represented at all; (2) when the *amicus* has an interest in another case that may be affected by the decision in the present case; or (3) "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Comm'n,* 125 F.3d 1062, 1063 (7th Cir. 1997).

If a party seeking to appear is perceived to be an interested party or an advocate of one of the parties to the litigation, leave to appear as *amicus curiae* should be denied. *See United States v. Gotti,* 755 F.

Supp. 1157, 1158-59 (E.D.N.Y. 1991). "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. . . the term 'amicus curiae' means friend of the court, not friend of a party." *Ryan,* 125 F.3d at 1063 (citations omitted).

c. The Proposed *Amicus Curiae* Briefs Do Not Meet the Required Legal Standard for Consideration by This Court

NMSU and NMPG fail to articulate any accepted purpose for the Court to burden itself with the consideration of two additional briefs (totaling almost 65 pages) in support of New Mexico's position. Indeed, the content of the briefs by NMSU and NMPG merely restate New Mexico's fully briefed position, offer no unique information or perspective that has not already been raised by New Mexico, and serve only to unnecessarily burden the Court. Perhaps most tellingly, neither NMSU nor NMPG even contest the Special Master's ultimate conclusion that New Mexico's Motion to Dismiss should be denied. NMSU Br. at 3; NMPG Br. at 2. They only take issue with certain aspects of the Special Master's reasoning and join New Mexico in asking this Court to ignore and exclude the comprehensive reasoning upon which the Special Master based his recommendation. Like New Mexico, the NMSU and NMPG briefs devote substantial attention to a discussion of New Mexico's

sovereignty and jurisdiction over water rights, all of which is already fully discussed by New Mexico in its 58-page brief.

NMSU and NMPG claim that the proposed *amicus* briefs would provide perspective into the interests of water rights holders and water users in the State of New Mexico, without articulating any reason why the State of New Mexico does not already adequately represent the interests of these entities consisting of citizens of the State of New Mexico. *See N. Sec. Co. v. United States,* 191 U.S. 555, 556 (1903) ("as the parties are represented by competent counsel, the need of assistance cannot be assumed"). NMSU and NMPG also do not claim to have an interest in any other case which will be affected by the decision of this case. Thus, NMSU and NMPG are effectively only allies of New Mexico. The duplicative arguments in their proposed briefs will have the effect of extending New Mexico's briefing by almost 65-pages. Accordingly, the requests for leave to file the *amicus curiae* briefs should be denied.

To the extent that the Court grants the requested leave to NMSU and NMPG to file the proposed *amicus curiae* briefs, Texas's substantive responses to the arguments are set forth *supra,* at pages 22-35.

CONCLUSION

No Party has taken exception to the Special Master's recommendation that the State of New Mexico's Motion to Dismiss the Texas Complaint be denied. Texas respectfully requests that the Court adopt the First Report, deny New Mexico's Motion to Dismiss Texas's Complaint, and direct the Special Master to proceed to hear the issues raised in the Texas Complaint, consistent with his determination in the First Report.

Respectfully submitted,

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